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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 319

RICHARD W. CROUGHAN,

Petitioner,

against

MICHAEL J. MURPHY, Police Commissioner of The City of New York,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Preliminary Statement

The petition is for a writ of certiorari to review an order of the Appellate Division, Second Department, entered January 27, 1969, which confirmed a determination of the Police Commissioner of the City of New York, made on May 18, 1964, dismissing petitioner from the City Police Department. The New York Court of Appeals denied leave to appeal.

Facts

On December 6, 1963, the city Police Department served on petitioner 12 charges, and on January 17, 1964, an additional 5 charges, a total of 17 charges in all.

To all 17 charges petitioner initially pleaded not guilty, but on February 28, 1968, made voluntary admission of the truth of most of the charges. That admission was contained in a writing prepared by his attorneys and entitled, "Admission of Facts."

At the hearings, extensive testimony was taken and documentary evidence introduced to cover the portions of the charges not admitted. Thereafter, the Trial Commissioner rendered his written report in which he recommended, based on 11 charges as to which he found petitioner guilty, that petitioner be dismissed from the Department. The respondent Police Commissioner adopted the Trial Commissioner's findings and recommendations and on May 18, 1964, made his final order of dismissal.

The 11 specifications of charge as to which petitioner was found guility, and the admissions and proof pertaining to same

Specification 1

This charged that petitioner, from about July, 1961 to about April 5, 1962, while a member of the force, engaged in another occupation, namely, that he was employed as a law clerk in the firm of Di Gennaro and Pelle, 52-40 Merrick Road, Massapequa, New York.

This charge was in substance admitted by petitioner (Admission of Facts, par. 1).

Specification 2

This charged that petitioner, from about April 23, 1962 to about March 12, 1963, while a member of the force, was

retained and employed as an attorney by various persons in connection with personal injury matters, as shown in particular lawyer-client retainer statements on file with the Judicial Conference in his name as attorney.

This charge was also in substance admitted (Adm., par. 2).

Specification 3

This charged that petitioner, from about November 12, 1962, to about September 24, 1963, while a member of the force, was an active member in the law firm containing his name in the title, Di Gennaro, Pelle and Croughan, 52-40 Merrick Road, Massapequa, New York.

This was substantially admitted (Adm., par. 3). Over all, from July 1961 to September 1963, petitioner brought or referred to the firm 82 or 83 cases (167-168).*

Specification 4

This charged that petitioner, from about December 31, 1961, to about September 1962, solicited and accepted legal business from members of the force under his supervision.

The admission was to the effect that during the period in question petitioner referred to the Di Gennaro firm named members of the police force; also that petitioner was personally retained as attorney by other named members of the force. In addition to the persons covered by petitioner's own admissions, the proof at the departmental hearing showed that petitioner, at a time when he was Supervisor of Patrol for the Borough of Queens and had the responsibility to supervise the patrol activities of every member of the force in the Borough of Queens, accepted

* All number references unless otherwise indicated are to pages of transcript of hearing before the Police Commissioner.

retainers from additional named members of the force in the Borough of Queens.

With respect to another member of the police force, Patrolman Timothy Sullivan, the Trial Commissioner in his report found, not only that legal business was accepted from him, but that petitioner solicited the case from him.

Petitioner in his present petition has singled out this case for special, extended treatment. Therefore, we will do the same:

Sullivan was injured while on his motorcycle on August 7, 1961 (177-178). He got in touch with his Command and was told to notify the 112th Precinct, which included the area where he had been injured (179). He went to the 112th Precinct station house and there was interviewed by petitioner (179). He had not known petitioner before, nor even heard of him (179).

Petitioner and Sullivan discussed the case from the standpoint of how the injury had occurred (179-180). Petitioner then told Sullivan that he had what appeared to be a good accident case (181). Petitioner at the same time mentioned that he was employed by a law firm (181). Petitioner told Sullivan that he was an attorney and that, if Sullivan so desired, he, petitioner, would handle the case for him (189).

Sullivan thereafter signed a retainer agreement at the offices of Di Gennaro and Pelle on August 28, 1961, which was the day after the accident (189-190). Petitioner himself was present at the offices of Di Gennaro & Pelle at the time of the signing (191). Petitioner at the time represented to Sullivan that he was an attorney (194), though in fact he was not admitted to the Bar until April 1962 (778).

Specification 5

This charged that petitioner, from about July 5, 1962, to about August 20, 1962, while a Captain and assigned

as Supervisor of Patrol in the Borough of Queens, filed statements of contingency retainer and compensation in his own name in the Judicial Conference, the instances being the same ones referred to in Specification 4, and the clients being, therefore, members of the force under his supervision.

Petitioner's admissions covered several instances of this, one in connection with Patrolman Anthony Palmese, attached to the 108th Precinct in the Borough of Queens and, therefore, under the supervision of petitioner as Supervisor of Patrol in that Borough (388, 394-395, 412). Palmese testified that, after he had come out of the hospital following an automobile accident on August 16, 1962, petitioner called Palmese to say he had some papers for Palmese to sign, and then came to see him (391-392). Palmese testified he had never met petitioner before (394), contradicting petitioner's assertion in the retainer statement he had filed with the Judicial Conference that he had known Palmese personally for over a year (395).

Specification 6

This charged that petitioner, from September 1962 to about August 1963, while a Captain and Commanding Officer of the 114th Precinct, Queens, "did solicit and accept legal business from members of the Force under his supervision".

The admission with respect to this Specification 6 was limited to the fact that Di Gennaro, Pelle & Croughan were retained as attorneys "by the following members of the Force or their wives, or both, said members of the force being under respondent's (i.e., petitioner's) supervision", followed by the listing of the names. The Police Commissioner found petitioner guilty under this Specification of having accepted the legal business from members of the Force under his supervision, but not of the solicitation (Order of Dism., App. A to Pet.).

Specification 7

This charged that petitioner, from about September 1962 to about August 1963, while a Captain and Commanding Officer of the 114th Precinct, recommended members of the force under his supervision to the law firm of Di Gennaro, Pelle and Croughan, of which he was a member and partner, and that firm subsequently filed contingency retainer statements with respect to such clients.

This specification was admitted, except for petitioner's attempted qualification that he was only a "special or limited partner" in the firm (Adm., par. 7).

Specification 8

This charged that petitioner, from about August 1961 to about November 1961, while a Captain and assigned to the 17th Division, had the responsibility, among his other duties, to investigate and determine whether injuries sustained by members of the force under his supervision occurred in the line of duty and, if so, whether those members of the force were free from negligence; that, while serving in this capacity and having these responsibilities, petitioner recommended to members of the force so injured that they retain the firm of Di Gennaro and Pelle in their personal injury actions; that at the time petitioner was employed as a clerk by that firm; and that thereafter those members of the force did retain that firm.

This charge, to the extent embraced in the above summary, was substantially admitted by petitioner. The admission covered specifically Patrolman Sullivan, previously referred to, and two other patrolmen, namely, Moneypenny and Lizzel. Patrolman Moneypenny testified that he and Lizzel were injured in an automobile accident on November 7, 1961, while on duty (207-208). On the following day, petitioner, who was Supervisor of Patrol in the 17th Division, came to the hospital where they were confined to investigate the accident (208-214). As a result of subsequent conversations between petitioner and the two injured

patrolmen, they both retained the firm of Di Gennaro and Pelle on petitioner's recommendation (215-217).

Specification 14

This charged that petitioner, between June 1962 and September 1962, while a member of the force, was engaged as a lawyer by a particular named patrolman and handled certain transactions for him for which he was paid.

The charge in question was substantially admitted (Adm. par. 2).

Specification 15

This charged that petitioner, between September 1962 and October 25, 1963, while a Captain and assigned as Commanding Officer of the 114th Precinct, used the Department property and building (114th Precinct House) for other than police business or official department purpose.

In support of this specification, it was proved that petitioner had used the police station and telephones for conversations connected with legal matters as to which he or his firm had been retained by members of the force or their wives (226-227; 306; 467-468; 479-480; 486-487; 495-496; 567-569).

Specification 16

This charged that petitioner, between January 1962 and July 1963, while a Captain, was engaged as an attorney by one, Lieutenant Graham, 11th Division, and handled certain transactions for him, for which he was paid.

This was substantially admitted, although it was claimed that payment was to the firm and not to petitioner personally.

The Police Commissioner found petitioner guilty as charged, except not of receiving the compensation.

Specifications 9, 10, 11, 12, 13 and 17

The Police Commissioner, following the Trial Commissioner, found petitioner not guilty under these specifications. Therefore, they need not concern us.

POINT I

The decision below was not erroneous in any way, and specifically was not in conflict with this Court's decision in *In Re Ruffalo*, 390 U. S. 544 (1968).

On the present petition, petitioner relies heavily on *In re Ruffalo*, 390 U. S. 544 (1968). The majority in that case held that it was a denial of due process in a disbarment proceeding to add a charge during the course of that proceeding based on testimony given by the attorney while testifying. Emphasized was that the attorney, charged with having employed a railroad employee named Orlando to investigate cases against the railroad for him, had not been put on notice prior to the time that he and Orlando testified that his employment of Orlando under the circumstances would be considered a disbarment offense. Stressed additionally was that, by delaying the charge until after the proceeding had commenced, the attorney was, in effect, entrapped (p. 551). In a footnote it was pointed out that the absence of this charge lulled the attorney into giving testimony as rebuttal to other charges which testimony was then turned into the basis for the new charge (*id.*, fn. 4).

It is noteworthy that two of the Justices who concurred in the result reached the conclusion that the conduct involved in the additional charge was such that reasonable men might differ as to its impropriety (390 U. S. at pp. 555-556). While the majority did not adopt this view, its description of the conduct (pp. 547-548) indicates that the conduct was of such a nature that, at the least, it was a clear case of impropriety.

The *Ruffalo* case does not aid the petitioner herein unless it be treated as holding that a charge may never, regardless of the circumstances, be amended during a hearing. It is submitted that the principle of *Ruffalo* does not apply to a situation where the person charged is not only aware by its very nature of the impropriety of the act but also has been charged in a somewhat similar respect with the very act in question, so that there is in no sense a trap or a lulling into a false sense of security.

That is what occurred in the present case. The petitioner was specifically charged with the solicitation of legal business under Specification 4. In the bill of particulars under this Specification 4, the Sullivan matter was not included. But under Specification 8, petitioner was charged with placing himself in a position where his private interests conflicted with his official police duties when he recommended to injured members of the force under his supervision "that they use the legal services of the law firm of DiGennaro and Pelle", that the law firm did subsequently represent these members, and that petitioner arranged to receive a portion of the sum recovered at a time when he was employed by the law firm as a law clerk. The Sullivan matter was specifically included in the bill of particulars under this charge.

Specification 8, under which the Sullivan instance was listed, did not use the word "solicitation". But the acts charged—while having the responsibility to investigate injuries to members of the force under petitioner's supervision to determine both their line-of-duty character and the members' freedom from negligence, recommending to those members of the force that they retain the firm of attorneys by which petitioner was employed to handle their personal injury actions—included everything that would constitute solicitation, and more.

The petitioner here was charged specifically with solicitation and he was charged specifically with acts in relation to Sullivan in every way the equivalent of solicitation.

It may be argued that, despite the reasoning of the majority opinion in *Ruffalo,* it stands for the principle that charges may never be amended after they are served and the proceeding commences. To contend so, however, would be to fail to heed the warning, given by Judge CARDOZO under other circumstances, that one should be wary of carrying a principle to "a drily logical conclusion." Fair play was violated in *Ruffalo.* Fair play was not violated in the present case.

POINT II

The decision below was not erroneous or in conflict with *O'Callahan* v. *Parker,* 395 U. S. 258 (1969).

Petitioner contends that, because solicitation of legal business is both a crime under the New York State Penal Law and constitutes misconduct for a lawyer under the New York State Judiciary Law and because petitioner was not subjected to criminal prosecution or proceedings to disbar or suspend him as a lawyer, the solicitation questions were "beyond the reach of the Police Department Police Commissioner" (Pet., p. 10).

However, there is not and never has been such a ground of contention cognizable in the cases. The Police Commissioner had the interests of his own Department to safeguard. If petitioner in his capacity of police officer were guilty of one or more offenses sufficient to justify dismissal, the mere fact he has not been punished criminally or in his capacity of attorney did not confer upon him immunity from disciplinary action by his own Department with respect specifically to his departmental misconduct.

O'Callahan v. *Parker,* 395 U. S. 258 (1969), involving a question as between military and civil jurisdiction in a situation of attempted rape by a soldier while on pass, holds nothing to the contrary.

POINT III

The claim that petitioner was found to have violated a Rule and Regulation not promulgated until nearly a year after the alleged commission of the offense, and that the Due Process clause of the Federal Constitution was accordingly violated, is without merit.

The rule petitioner cites in this connection is R. & P. 2/35.0 of the Rules and Procedures of the New York City Police Department. That rule, so far as here pertinent, reads as follows:

> "2/35.0 The city Code of Ethics provides that a member of the department shall not:
>
> a. Engage in any business or transaction or have a financial or other private interest, direct or indirect, which is in conflict with the proper discharge of his official duties.
>
> * * *
>
> h. Engage in or accept private employment or render services for private interests when such employment or service is incompatible with the proper discharge of his official duties.
>
> i. Solicit, negotiate for, or promise to, accept employment, by any person, firm or corporation with which he or the Police Department is engaged on behalf of the city in the transaction of business or which is or may be affected by his official action.
>
> The provisions of this paragraph, based on the Code of Ethics, shall apply to all members of the department except that where any portion of the subject matter appears in a more restrictive manner elsewhere in the Rules and Procedures or orders of the department, the more restrictive provisions shall apply to the

members so affected. (Example: 2/47.0 prohibiting members of the force from engaging in any occupation.)"

This rule, as it recites in its opening sentence and closing paragraph, does no more than carry over with specific reference to members of the police force what was already applicable to all city employees generally under the "city Code of Ethics". That Code had been in force at least as far back as 1959 (Administrative Code of the City of New York, Sect. 1106-1.0, formerly Administrative Code, Sect. 898-1.0; Local Law of the City of New York, No. 73 (1959).

Second, petitioner did not have to be forewarned by express regulation that it was unethical: (1) to engage in any business or transaction or have a financial or other private interest "in conflict with the proper discharge of his official duties", (2) to render services for private interests "incompatible with the proper discharge of his official duties", or (3) to solicit, negotiate or accept employment by any person "with whom he or the Police Department is engaged on behalf of the City in the transaction of business or which is or may be affected by his official action."

Petitioner's offenses, of which he was found guilty, are additionally the subject of specification and provision in Rules 2/24.0 and 2/63.2, barring respectively the recommendation of an attorney other than in personal affairs, and discreditable conduct generally such as would bring adverse criticism upon the Department. Therefore, were there the faintest ground for petitioner's line of contention in this regard, that ground would be completely destroyed by the fact that Rule 2/35.0 was at most surplusage and a repetition of what was already the subject of formulation and provision in Rules 2/24 and 2/63.2.

POINT IV

There is no merit in petitioner's claim that his dismissal was an unconstitutional selective enforcement of an administrative regulation. *Cox* v. *Louisiana*, 379 U. S. 536 (1965), is inapplicable.

Petitioner claims a selective enforcement of the administrative regulations and cites in his petition (pp. 11-12) four supposedly "similar" cases involving police officers who were also lawyers. There is nothing in the record concerning those other disciplinary cases. In the Appellate Division, when the same contention was advanced, respondent was able to satisfy the Court by going outside the record in response to its inquiry, that those other cases differed in all main particulars from the case at bar.

CONCLUSION

The petition for a writ of certiorari should be denied.

August 18, 1969.

Respectfully submitted,

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